Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1326

BARRETT HESS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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October Term, 1979

No.

BARRETT HESS,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this case on November 26, 1979.

OPINION BELOW

The unreported opinion of the Court of Appeals is reproduced in the appendix hereto at A-3. The order and judgment of the District Court is also reproduced in the appendix, at A-1.

JURISDICTION

The judgment of the Court of Appeals was entered November 26, 1979. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on January 29, 1980 by orders

reproduced in the appendix at A-6. This petition is being filed within 30 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a fair trial can be had despite complete disregard by the trial court for Federal Rule of Criminal Procedure 30, regarding instructions to the jury.

2. Whether the Court, in the important and necessary exercise of its supervisory powers over the conduct of federal criminal trials, should sanction a criminal conviction tainted by prosecutorial misconduct at the trial, and at which the trial judge refused to take even minimal steps to avert the taint of prejudicial publicity.

STATUTORY PROVISION INVOLVED

Rule 30, Federal Rules of Criminal Procedure:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

STATEMENT OF THE CASE

Petitioner Barrett Hess, a Rochester, New York attorney, was charged with three counts of tax evasion in violation of 26 U.S.C. § 7201. After a trial of more than five weeks before District Judge Harold P. Burke and a jury, petitioner was convicted on each count. On July 23, 1979, he was sentenced to concurrent terms of six months and one day in prison on each count, and was fined $25,000. Petitioner appealed the conviction to the United States Court of Appeals for the Second Circuit which, by summary opinion dated November 26, 1979, affirmed. A petition for rehearing with a suggestion for consideration *en banc* was denied by orders dated January 29, 1980.

REASONS FOR GRANTING THE WRIT

1. The opinion below conflicts with the decisions of this Court and the Courts of Appeals regarding procedures for instructing the jury.

Federal Rule of Criminal Procedure 30 requires a trial judge in a criminal case to rule on requests to charge prior to closing arguments, and to afford counsel the opportunity to object to the charge out of the hearing and, on request, out of the presence of the jury. The trial judge here did neither. Judge Burke received written requests to charge, but he held no pre-charge conference, he did not advise counsel of his rulings on their requests, and, most critically, he insisted that defense counsel except to the charge within the presence and hearing of the jury. The acceptance of that procedure by the Second Circuit ignores the plain meaning of Rule 30, as well as this Court's discussion of that rule in *Hamling v. United States*, 418 U.S. 87 (1974).

In *Hamling*, a defense request to excuse the jury so that objections to the charge could be made outside its presence was denied. Instead, the objections were made at a bench conference, one of many such conferences during the trial. There was no

indication that the jury heard the discussion. 418 U.S. at 135. The Court affirmed the conviction, but emphasized the importance of literal compliance with Rule 30.

> [Rule 30] . . . is principally designed to avoid the subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the judge. While that goal might be served in many cases by a sufficiently low-tone bench conference, the ultimate way to assure the goal is to comply with the rule.

418 U.S. at 134 (citations omitted).

Here, there was no attempt whatsoever to follow the Rule. Defense counsel was forced to argue his objections in full view and hearing of the jury (A-8-13). The jury heard each defense objection flatly rejected, by an obviously impatient judge, immediately before its deliberations began. Surely the Court's admonition in *Hamling* was lost on the Court of Appeals in its affirmance on such facts.

At the time *Hamling* was decided, the circuits appeared split into three groups with respect to Rule 30 violations. The Third and Fourth Circuits had held that reversal is required unless the government demonstrates that the defendant was not prejudiced by the error. *United States v. Schartner*, 426 F.2d 470 (3d Cir. 1970); *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948). The Tenth Circuit held that violation of Rule 30 mandates automatic reversal. *Hall v. United States*, 378 F.2d 349 (10th Cir. 1967). The Second Circuit held that the burden may be on the defendant to show prejudice for the violation to require a reversal. *United States v. Fernandez*, 456 F.2d 638 (2d Cir. 1972).

In *Hamling*, the clear absence of prejudice led the Court to refrain from deciding whether to adopt the "apparently more lenient standard" of the Second Circuit. 418 U.S. at 135. Since *Hamling*, the split among the circuits has persisted. *Compare United States v. Buie*, 538 F.2d 545 (4th Cir. 1976) *with United States v. Lyles*, 593 F.2d 182 (2d Cir.), *cert. denied*, 99 S. Ct. 1537 (1979); *United States v. Conlin*, 551 F.2d 534 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977). Having the result in a federal tax case turn upon the way a given circuit applies supposedly uniform federal procedure dictates that the Court should now decide the question left open in *Hamling*.

This case shows the danger of failing to insist on full compliance with Rule 30. Placing the burden on a defendant to demonstrate prejudice in this situation imposes an impossible task. No defendant can articulate, much less prove, the extent of the psychological impact upon the jury when the defense attorney is humiliated immediately prior to jury deliberations.

The importance of Rule 30 to the fair administration of criminal justice, and its repudiation here — without any justification — requires that the writ of certiorari be granted. The Court should adopt a *per se* rule of reversal. Deliberate violation of Rule 30 cannot be sanctified by a harmless error analysis. The incalculable and unprovable damage done to criminal defendants by unnecessary actions such as that below mandates no less.

2. The decision below sanctioned such an extraordinary departure by the District Court from the accepted and usual course of judicial proceedings that an exercise of the Court's power of supervision is required.

The Court has recognized its obligation to grant a writ of certiorari to a federal Court of Appeals in cases in which criminal justice has not been dispensed fairly. Supreme Court Rule 19(1) (b); *Marshall v. United States*, 360 U.S. 310 (1959); *McNabb v. United States*, 318 U.S. 332 (1943). The errors in the trial of this case are such as to compel the exercise of these supervisory powers.

(a) *Publicity*

The trial of a local attorney for alleged evasion of substantial amounts of income tax attracted much attention in the local press. An article that appeared on the eve of the trial was headlined "Improper Questions to Jurors Suspected," and referred to alleged contacting of potential jurors by the defense. A-14. When it appeared during *voir dire* that a potential juror may have read the article, Judge Burke asked a series of questions, brandished the article before the entire array, and said "[t]his article appeared in last night's Times Union. Is that the article you are referring to?" A-25.

The publicity issue should have been handled by individual *voir dire*, as defense counsel had requested (Tr. *voir dire* 25-26), so that the entire panel would not be influenced by the questioning regarding the article. *United States v. Lord*, 565 F.2d 831 (2d Cir. 1977); *see Marshall v. United States*, 360 U.S. 310 (1959).

The failure to conduct an individual *voir dire* was only the first of many deviations from proper trial procedure. The court refused, again without justification, to take even minimal steps to avoid prejudice to petitioner. Repeated requests by defense counsel for admonitions to the jury about publicity were rejected (A-26-28), despite the clear requirement that such instructions be given. *United States v. Agueci*, 310 F.2d 817, 831-32 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). The court refused to hold side-bar conferences, and was insensitive to the efforts of defense counsel to shield the jury from prejudicial comments or arguments of counsel (Tr. *voir dire* 46-51, 75-76, 137; Tr. Vol. 2, 26, 32-34; Vol. 5, 264-65; Vol. 10, 651; Vol. 12, 793-96; Vol. 13, 886, 889; Vol. 17, 1214; Vol. 27, 2127, and Vol. 35, 2948).

(b) *Prosecutorial Misconduct*

The prosecutorial misconduct in this case was itself significant enough to deny petitioner a fair trial (A-29-31). It included assertions in the government's summation that petitioner had lied (Tr. summation 20, 32, 33, 187, 188, 190) or that his witnesses lied (Tr. summation 124, 137, 138, 160, 161, 174-75, 187, 188). Such comments flagrantly disregard the ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, § 5.8 (1971), and judicial warnings. *See, e.g., United States v. Sprayregen*, 577 F.2d 173, (2d Cir.), *cert. denied*, 439 U.S. 979 (1978); *United States v. Gonzalez*, 488 F.2d 833 (2d Cir. 1973); *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973).

The prosecutor improperly referred to petitioner's assertion of the attorney-client privilege (Tr. Vol. 14, 1011-14); *see A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 101 (S.D.N.Y. 1950); 8 Wigmore, Evidence §§ 2243, 2322, 2386. Equally improper was his reference to petitioner's failing to provide leads within the meaning of *Holland v. United States*, 348 U.S. 121 (1954), and thus to remain silent under the Fifth Amendment. *See, e.g., Griffin v. California*, 380 U.S. 609 (1965); *United States v. Hale*, 422 U.S. 171 (1975); *Doyle v. Ohio*, 426 U.S. 610 (1976). The prosecutor referred to out-of-court conversations he had had with defense witnesses (Tr. Vol. 32, 2540-48, 2608-13; Vol. 38, 3272-73), made argumentative and demeaning remarks about petitioner (Tr. Vol. 34, 2847-48, 2853, 2861-62, 2865; Vol. 35, 2907-08), and misstated the record (Tr. Vol. 5, 245-46; Vol. 12, 794-96, 806-07).

Ultimately, this Court should grant the writ of certiorari and exercise its supervisory powers to reaffirm the duty of the federal prosecutor set forth in *Berger v. United States*, 295 U.S. 78, 88 (1935). Petitioner was afforded the benefit of none of the "dignity and self-discipline" expected of government counsel, *United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), and such deplorable conduct should not be condoned by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Dated: February 25, 1980

Respectfully submitted,

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APPENDIX

ORDER AND JUDGMENT OF DISTRICT COURT

WESTERN DISTRICT OF NEW YORK
SUPERSEDING INDICTMENT
Docket No. CR. 78-00084-01

DEFENDANT
BARRETT HESS

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — July 23, 1979

WITH COUNSEL (Name of counsel) Robert S. Fink, Esq.

FINDING & JUDGMENT

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the U.S. (Cts. 1, 2 & 3), in violation of T. 26, U.S.C., § 7201.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant hereby sentenced as follows: The Court: On Count One I impose a fine of $5,000 and I impose a prison term of six months plus one day. On Count Two I impose a fine of $10,000 and I impose a prison term of six months plus one day. On Count Three I impose a fine of $10,000 and I impose a

prison term of six months plus one day. The prison terms to be served concurrently.

SIGNED BY
U.S. District Judge /s/ HAROLD P. BURKE
HAROLD P. BURKE, District Judge
Date July 23, 1979

ATTEST: A TRUE COPY
JOHN K. ADAMS, Clerk
By B. Knight
Deputy Clerk
Original filed July 24, 1974

SUMMARY OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of November, one thousand nine hundred and seventy-nine.

Present:

HON. WILLIAM H. TIMBERS, HON. ELLSWORTH A. VAN GRAAFEILAND, HON. JON O. NEWMAN, Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARRETT HESS,

Defendant-Appellant.

Docket No. 79-1299

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed.*

Appellant appeals from a judgment of conviction, after a jury trial, on three counts of income tax evasion, in violation of 26

U.S.C. §7201 (1976). He does not challenge the sufficiency of the evidence.

His first claim is that he was denied a fair trial because the district court failed to insulate the jury from improper influences, including publicity, argument of counsel concerning legal matters, and alleged hearsay testimony. As for the publicity, we hold that the district court did not abuse its discretion. The rationale of *United States* v. *Lord*, 565 F.2d 831 (2 Cir. 1977), was complied with in that the other jurors were not exposed to the substance of the publicity. With respect to the arguments of government counsel concerning legal matters, appellant has failed to demonstrate any prejudice requiring reversal. As for the testimony of Paul Crane, we hold that it did not include inadmissible hearsay.

Appellant's second claim is that his conviction should be reversed because the district court failed to comply with Fed. R. Crim. P. 30 and also rejected his requests to charge. Without sanctioning the court's failure to comply with Rule 30, we hold that there was no prejudice requiring reversal. Appellant has failed to show specifically how his summation was hampered. It is highly improbable that the court's abrupt manner of dealing with defense counsel's exceptions to the charge had any influence on the jury. Moreover, the court's charge was fair and well balanced, especially on the key issue of willfulness.

Appellant's third claim is that alleged prosecutorial misconduct deprived him of a fair trial. Again, without sanctioning all of the government's conduct, we hold that such conduct, under the circumstances of this case, does not require reversal. When as here the trial was long and complicated and the evidence of guilt was overwhelming, the extraordinary remedy of reversal will be reserved for the truly extraordinary case of prosecutorial misconduct. This is not such a case. *See, e.g.*, *United States* v. *Sprayregen*, 577 F.2d 173, 175 (2 Cir.), *cert. denied*, 439 U.S. 1979 (1978); *United States* v. *White*, 486 F.2d 204, 207 (2 Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), and many other cases in this Circuit.

Appellant's final claim is that he was denied his right to a speedy trial. We have carefully examined this claim in light of the record. We hold that appellant was not denied a speedy trial under either the Speedy Trial Act, the Western District Plan or *Barker* v. *Wingo*, 407 U.S. 514 (1972).

Affirmed.

/s/ WILLIAM H. TIMBERS
William H. Timbers

/s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. VanGraafeiland

/s/ JON O. NEWMAN
Jon O. Newman

Circuit Judges.

ORDERS DENYING REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of January, one thousand nine hundred and eighty.

Present:

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH VAN GRAAFEILAND, HONORABLE JON O. NEWMAN, *Circuit Judges.*

UNITED STATES OF AMERICA,

Appellee,

v.

BARRETT HESS,

Appellant.

79-1299

A petition for a rehearing having been filed herein by counsel for the Appellant

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of January, one thousand nine hundred and eighty.

UNITED STATES OF AMERICA,

Appellee,

v.

BARRETT HESS,

Appellant.

79-1299

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN
Chief Judge

TRANSCRIPT OF PROCEEDINGS ON MARCH 28, 1979

Pages 29-36:

• • •

THE COURT: • • •

And requests or exceptions?

MR. SCHARF: None by the Government.

MR. FINK: Yes, Your Honor. Could we have a conference in chambers, Your Honor?

THE COURT: What?

MR. FINK: Could we have a conference on requests to charge.

THE COURT: No, I am not going to hold any conferences.

MR. FINK: Your Honor, could you grant charge request number 16.

THE COURT: What is that?

MR. FINK: Would you grant our request, of charge request number 16?

THE COURT: You will have to wait until I look at it.

MR. FINK: Fourteen and 15.

THE COURT: I believe I have covered 16. I decline to charge.

MR. FINK: Would Your Honor want me to state my objections to the charges?

THE COURT: Well, that's the only way the record will show you object.

MR. FINK: Should I do that in front of the jury, Your Honor?

THE COURT: Yes, you do it by number. You don't have to read the charge or request to charge.

MR. FINK: Your Honor indicated — Your Honor talks about intent. Your Honor indicates —

THE COURT: Don't tell me what I have done. Tell me what you request or except to.

MR. FINK: The knowledge — there must be knowledge on the part of the defense of any falsity.

THE COURT: I have so charged completely.

MR. FINK: Under your charge of wilfulness, you talk about —

THE COURT: Just one moment. I have charged in the case. You filed a number of charges. I've given charges on a number of those and denied others. And they were all numbered.

MR. FINK: Yes, Your Honor. On charge number eight, Government charge number eight.

THE COURT: I decline to so charge. I think I have covered that fully.

MR. SCHARF: He referred to Government's eight, not defendant's. Mr. Fink referred to Government's eight. You are looking at defendant's eight, I believe.

THE COURT: I am looking at the defendant's.

MR. SCHARF: Mr. Fink referred to the Government's number eight.

MR. FINK: Government's charge number eight. I object to certain portions of that charge.

THE COURT: Wait until I locate it.

That's the Government's request. You don't have to be considered with that.

MR. FINK: I thought Your Honor wanted me to object specifically to each portion of the Government's requests.

THE COURT: I'm not passing on the Government's requests at all. The Government can except if they want to.

MR. FINK: I wanted to let the Court know the manner in which I specifically objected to the Government's requests as given.

THE COURT: Listen, just because the Government has requested charges, that doesn't mean I have charged them. I have charged them exactly as I have given it, not because the Government has requested certain things in writing.

MR. FINK: Yes, Your Honor —

THE COURT: The Government request has got nothing to do with the case.

MR. FINK: Yes, Your Honor, but you did give this request.

THE COURT: What?

MR. FINK: You did give this request.

THE COURT: Give what?

MR. FINK: Government request number eight was read by Your Honor to the jury.

THE COURT: It was not read. I prepared my own charge.

MR. FINK: Government request number ten, as read to the jury.

THE COURT: The Government's request has got nothing to do with the case.

MR. FINK: Okay. On the issue of concealment, Your Honor, I think Your Honor gave the request, as stated by the Government, did not —

THE COURT: Listen. Would you please not refer to what the Government requested. I made my own request, with no reference to the Government request to charge at all.

MR. FINK: I object specifically, then, to the request as contained —

THE COURT: The what?

MR. FINK: To the charge, as it relates to any alleged concealment or any alleged failure to keep books and records, in that it only gave the Government's version and not the defense's.

THE COURT: The exception is noted.

MR. FINK: I objection to permitting an inference from consecutive, alleged consecutive understatement because in this —

THE COURT: The exception is noted.

MR. FINK: My ground is that in this trial, where you have blank returns, if there was an error in one year, it would naturally be in successive years, since the facts were the same.

THE COURT: The exception is noted.

MR. FINK: The same would hold true as far as signing the return, and knowledge. In this case, where you have blank presigned returns, I object —

THE COURT: Objection is noted.

MR. SCHARF: I object to Mr. Fink saying what the evidence is. It's for the jury to conclude —

THE COURT: The exception is noted.

You are looking at some paper there. I don't know what it is, and you are apparently making your objections from that. I didn't use any paper, such as you have, to prepare a charge.

MR. FINK: These are my notes, Your Honor. My notes are written on this.

THE COURT: Go ahead and make your objections.

MR. FINK: Your Honor indicated that the net worth, you would have to take into consideration such items as gifts and

inheritances and life insurance, and other items not pertinent here. I think what is pertinent here is the pooling of money legally belonging to others.

THE COURT: The objection is noted.

MR. SCHARF: I object to him stating it as evidence.

THE COURT: The objection is noted. The exception is noted.

MR. FINK: Also, I think it only gives the claims of the Government in the net worth and not the claims of the defense.

THE COURT: The exception is noted.

MR. FINK: In dealing with the testimony of witnesses —

THE COURT: What?

MR. FINK: In dealing with the testimony of witnesses, Your Honor indicated that it is the duty of jurors to reconcile inconsistencies. I don't think it is their duty to reconcile it. They can reject it.

THE COURT: I don't care what you think. Object to it, then.

MR. FINK: I object to that portion.

THE COURT: The objection is noted.

You're looking at typewritten pages that were prepared before I gave the charge. You won't find your objections in there.

MR. FINK: But I made notes as I went along, Your Honor.

THE COURT: You're not looking at notes. You are looking at the typewritten —

MR. FINK: Yes, but it has my ink notes on it, Your Honor, honest.

I specifically object to the extent that our charges were not given and previously requested.

THE COURT: Listen. I have got your requests to charge, every one of them. If you want, I have got them all numbered here. If you want me to expressly rule on each one of them, I will.

MR. FINK: I would ask that Your Honor give charge number six on reasonable doubt.

THE COURT: I decline to so charge.

MR. FINK: I would ask specifically then for number ten.

MR. SCHARF: Your Honor, the Government objects to that. That is a statement of law —

THE COURT: Just one moment, please.

I decline to so charge.

MR. FINK: Thank you, Your Honor.

(At 11:00 a.m., the jury retired to deliberate upon a verdict.)

NEWS ARTICLE FROM TIMES UNION DATED FEBRUARY 19, 1979 (Joint Appendix A289)

IMPROPER QUESTIONS TO JURORS SUSPECTED

Lawyers representing Barrett Hess, local lawyer accused of income tax evasion, may have investigated prospective jurors in Hess's upcoming trial improperly, according to papers filed in U.S. District Court.

Before jury selection begins tomorrow in Hess's trial, federal prosecutors want U.S. District Judge Harold P. Burke to order the defense to say whether they conducted an investigation "of any kind to determine background, biographical or other information regarding prospective jurors" and whether "any contacts, interviews or other communications were made."

If jurors were contacted, the prosecutors also want the investigators to be in court tomorrow morning to explain their activities.

Because improprieties may have occurred, the government's request for a statement by defense is essential to guarantee that an open-minded jury panel be available Jared J. Scharf and Richard Humphrey said in their motion papers filed last week. Scharf and Humphrey are trial attorneys with the U.S. Department of Justice.

Prospective witnesses for the government said they had been interviewed by people identifying themselves as "agents," the prosecutor's court papers said.

"These witnesses stated that they were of the belief that they were being questioned by government agents. If similar means were employed to contact and interview prospective jurors, then the entire panel (of prospective jurors) may harbor pre-conceived notions of excessive and, perhaps, improper interference by the

government in the selection of the jury. This would prejudice the government's right to a fair trial."

Hess, 39, of 21 Runnymede Court, Brighton, is accused of filing false income tax returns for the years 1971, 1972 and 1973, stating a total income of $69,583.69 when he knew it was actually about $393,000. The total tax of $18,005.34 he stated for those three years was actually $178,000, according to the federal indictment.

NEWS ARTICLE FROM DEMOCRAT & CHRONICLE DATED FEBRUARY 21, 1979
(Joint Appendix A290)

LAWYER'S 'LAUNDRY' TRIAL ON

By NANCY MONAGHAN

A federal prosecutor said yesterday he will prove Rochester lawyer Barrett Hess "laundered" money through bank accounts in others' names to evade his income taxes.

But Hess's lawyer said he will prove an accountant is to blame for Hess's tax problems.

It will be four to six weeks before a jury decides which version is correct. Hess, 39, of 21 Runnymede Court, went on trial yesterday in U.S. District Court. He is accused of evading more than $250,000 in income taxes over three years.

The question, both lawyers agreed, is whether the underpayment of taxes was accidental or intentional.

"You will hear testimony about the ways (Hess) laundered money . . . just to throw the Internal Revenue Service off in case of an investigation," federal prosecutor Jared Scharf told the jury.

Scharf talked about Hess' parents, "people of modest means."

"You will hear testimony that he put some of the interest he was earning on their tax returns."

In 1973, Scharf said, Hess claimed he earned $69 in interest. Then he learned he was being investigated by the IRS, Scharf told the jury, so he claimed interest income of $42,000 on his 1974 return.

Hess's lawyer, Robert Fink, talked about Hess's modest lifestyle.

News Article From Democrat & Chronicle
Dated February 21, 1979
(Joint Appendix A290)

"But the evidence will show that life has not been easy for Barry. You will hear evidence of emotional problems . . . so that when something is difficult, like tedious calculations, Barry has a tendency to push it aside, to put it on others."

Fink's opening statement drew nearly a dozen objections from Scharf and one loud rebuke from Judge Harold Burke.

"(The case) has nothing to do with tax," Fink said, trying to explain to the jury they could only convict Hess if it's proven he intentionally evaded his taxes.

"It certainly does have something to do with the tax," Burke broke in, "or we wouldn't be here."

When Hess realized he hadn't paid enough taxes for 1971, 1972 and 1973 he hired a lawyer and an accountant to analyze his finances and then paid the extra taxes, Fink said. Hess is accused of underpaying his federal income tax by $23,000 in 1971, by $27,000 in 1972, and by nearly $110,000 in 1973.

The jury of six men and six women will begin hearing testimony today.

NEWS ARTICLE FROM TIMES UNION DATED FEBRUARY 21, 1979 (Joint Appendix A291)

BRIGHTON LAWYER EVADED TAXES, JURORS ARE TOLD

By DOLORES ORMAN

Local lawyer Barrett Hess, accused of income tax evasion, "laundered money through bank accounts and other people's names to throw the Internal Revenue Service off," a federal prosecutor charged in U.S. District Court yesterday.

Jared Scharf, trial attorney with the U.S. Department of Justice in Washington, D.C., told a federal jury that he would prove Hess owed a substantial tax, that he "committed an affirmative act to evade that tax" and that he "did it with willful intent, it was not a mistake, an accident or negligence."

The substantial tax owed, the act to evade it and willful intent are the three essential elements that must be proved for a conviction of income tax evasion, Scharf explained in his opening statement.

"Barrett Hess is innocent," defense attorney Robert Fink of New York City told the jurors. "There was no criminal intent, no fraud, no evasion." Fink said he would prove that the accountant who had been responsible for Hess's tax matters lied under oath. Fink described the accountant as the government's key witness.

Fink claimed Hess himself discovered the tax as filed "substantially underestimated" his income and that a "leading firm of public accountants" was brought in to determine exactly what was owed. Fink told the jury the additional tax plus the penalties had been paid and that the only issue in the trial was whether Hess knowingly intended to evade his income taxes.

The trial is expected to last four to six weeks. Scharf said he will call some 120 government witnesses.

News Article From Times Union Dated February 21, 1979 (Joint Appendix A-291)

Hess, 39, of 21 Runnymede Court, Brighton, is accused of filing false and fraudulent joint income tax returns for the years 1971, 1972 and 1973, stating a total income of $69,583.69 when he knew it was actually about $393,000. The total tax of $18,005.34 he stated for those three years was actually $178,000, according to the three-count federal indictment.

Each count carries a maximum penalty of five years in prison, a $10,000 fine or both. If Hess is convicted of the felony, he also faces disbarment.

Scharf told the jury he would show that Hess's net worth between Dec. 31, 1966, when he began practicing law, and Dec. 31, 1973 was growing constantly and at a greater rate that what was being reported on his income tax returns.

"He only reported 6½ percent of his income," Scharf charged. "He did this over a seven-year period."

Scharf said he would prove, among other things, that Hess:

- Reported interest income on his tax returns only once during the period in question, and that was only $69. But on his 1974 return, after the IRS investigation had begun, he reported $42,000.

- Put some of his interest income into his parents' tax returns. His parents had a small upholstery business and were of modest means.

- Concealed interest income from his accountant.

Fink, Hess's attorney, told the jury that the prosecution's case "stands or falls" on David Shaw, who was Hess's accountant.

Fink said Hess "completely trusted and relied on" Shaw. Hess used to sign blank checks and blank tax returns, give them to Shaw and tell him to "take care" of his taxes, Fink told the jurors.

News Article From Times Union Dated February 21, 1979
(Joint Appendix A-291)

"This trust was misplaced and Barrett Hess has been paying dearly for it ever since," Fink said.

When Shaw was contacted by the IRS, he "feared embarrassment . . . so he lied to protect himself," Fink said. "I will prove to all of you David Shaw lied under oath."

Even if they believe Hess was irresponsible, Fink told the jurors, he "can't be found guilty because he's irresponsible."

"Barrett Hess had emotional problems in his life," Fink said. "He had difficulty in college and law school because of it," Fink said.

Fink said that when Hess is confronted with something that "has to do with numbers or tedious calculation" he pushes it to others, and that he did so with his tax matters.

Evidence will show, Fink contended, that Hess specializes in physical injury cases, is a family man, lives "comfortably" but "doesn't live flamboyantly."

In court papers filed last week, Scharf and his co-counsel, Richard Humphrey, alleged that Hess's attorneys may have conducted improper investigations of prospective jurors. They requested District Judge Harold P. Burke to order the defense attorneys to explain what investigative activities, if any, were conducted.

The issue was argued before Burke at a closed hearing in his chambers yesterday morning prior to the start of jury selection.

When asked about the hearing afterward, Scharf said that to his knowledge there were "no improprieties. There's no problem. Things have been resolved."

Fink would not comment.

At one point as he questioned prospective jurors during jury selection, Scharf told them "the government doesn't have any body language experts or any computer analysis to help" with jury selection.

NEWS ARTICLE FROM DEMOCRAT & CHRONICLE DATED MARCH 9, 1979
(Joint Appendix A-292)

PAPER WEIGHS HEAVILY IN TAX CASE

By BRIAN ROONEY

It is largely a paper trial. No weeping widows, no photographs of the scene and no weapons shown in evidence.

The trial started on Feb. 20 when an Internal Revenue Service official brought Barrett Hess's income tax returns into evidence.

Since then, federal prosecutors have brought 89 witnesses to the stand in U.S. District Court here to try to show that Hess's personal and professional finances were a maze of stocks, bank accounts and laundered cash.

In the past three weeks a jury of six men and six women has heard testimony about Hess's stock purchases, a car he bought, hospital bills, a nursery school for a child, his Master Charge bill and properties he bought and sold.

Hess, 39, of 21 Runnymede Court, is a local lawyer accused of evading more than $250,000 in income taxes from 1972 through 1974.

The prosecution, run by Assistant U.S. Attorney Jared Scharf, is attempting to prove there is a vast difference between the taxable income Hess reported in the three years under question and the actual amount of money he made.

Scharf is doing that by trying to show that Hess's personal worth grew in unbalanced proportion to what Hess reported he made.

Documents are the weapons of both offense and defense. Behind the prosecution table are six boxes of documents — affidavits, checks, vouchers and bank statements offered in evidence.

News Article From Democrat & Chronicle
Dated March 9, 1979
(Joint Appendix A292)

Behind the defense table are two black metal cabinets holding more of the same.

One of the prosecution's most important witnesses, Hess's former accountant, David Shure, took the stand Wednesday and testified through yesterday.

Shure said he first helped Hess with his taxes in 1964 when Hess made about $600. When Shure quit Hess's service in 1973, Hess was dealing in hundreds of thousands of dollars, according to the prosecution.

Shure said he first began to see odd business dealings on Hess's part when he noticed in 1972 that some stocks Shure believed belonged to Hess's parents were sold by Barrett Hess.

"So I asked why. How come a stock belonging to Alfred and Irene Hess got sold under Barrett Hess? So he said it was his stock."

Shure also said that he noticed in 1972 that "His (Hess's) gross receipts had gone up, but his profit seemed to stay somewhere in the same category as before."

Shure said he asked Hess what was in a trust account Hess allegedly used for personal expenditures but didn't report on his income tax. Shure said Hess told him "that it was only an escrow account which contained fees from his clients and disbursements for his clients."

But Shure said Hess assured him nothing was amiss. "He was a friend and I trusted him," Shure said.

Much of the testimony in the trial is dry and rather technical. The tedium of it seems to wear away at the jury which readily breaks into laughter at the first opportunity.

News Article From Democrat & Chronicle
Dated March 9, 1979
(Joint Appendix A292)

Rocking in their chairs and propping up their chins with their hands, the jurors seem to enjoy it when Judge Harold P. Burke barks at the lawyers and witnesses.

The prosecution is expecting to finish its case in the middle of next week. When Shure finishes testifying, the prosecution plans to query Martin Molinari, an Internal Revenue Service agent who is supposed to testify about Hess's true net worth according to documents and evidence accepted in the trial.

TRANSCRIPT OF PROCEEDINGS ON FEBRUARY 20, 1979

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Tr. *voir dire* 44-46:

MR. FINK: Does any juror here have any personal knowledge concerning either Barrett Hess or of any of the charges that are alleged herein?

Do any of you read a local Rochester newspaper?

THE COURT: They all read them. What do you want to know, if they read last night's paper about this case?

MR. FINK: Have any of you read anything about this case?

PROSPECTIVE JUROR: Last night I glanced over it when I come home from work, at one o'clock in the morning.

MR. FINK: I would like as to this particular witness that we have an individual voir dire.

THE COURT: You can examine him now, right now.

MR. FINK: Your Honor, it is in front of everyone.

THE COURT: Examine him right now, or I will.

MR. FINK: But then it will be as though everyone had read that article.

THE COURT: What?

MR. FINK: If I examine about the article, then it will be as though all twelve have read the article.

THE COURT: If you are going to examine him, go ahead and do it, or I will do it.

MR. FINK: I don't want to do it, Your Honor. I think it will be wrong.

THE COURT: Did you read last night's paper?

PROSPECTIVE JUROR: Partially, yes.

THE COURT: The article about this?

PROSPECTIVE JUROR: Partially, yes.

THE COURT: Have you got the article?

MR. FINK: Yes, I do, Your Honor.

THE COURT: Let me have it.

(Newspaper article handed to the Court.)

THE COURT: This article appeared in last night's Times Union. Is that the article you are referring to?

PROSPECTIVE JUROR: Yes. It is the article I referred to.

THE COURT: Having read the article have you any preconceived notions about the guilt or innocence of this defendant?

PROSPECTIVE JUROR: No, Your Honor. I haven't been contacted by anyone. It is the first time I heard of the case here.

THE COURT: You believe that you could be a fair and impartial juror regardless of your having read that article?

PROSPECTIVE JUROR: Yes, Your Honor. I don't see why not.

TRANSCRIPT OF PROCEEDINGS ON FEBRUARY 21, 1979

* * *

Pages 164-66:

THE COURT: If I wanted to make sure the jury would read it, I would tell them not to read it.

MR. FINK: We have some sort of —

THE COURT: I'm surprised you don't know that, as a trial lawyer.

MR. FINK: Could we have some sort of instruction telling them not to discuss the case with one another till the evidence is completely in and they are deliberating?

THE COURT: I am not going to do that. You made it clear to them that they should reserve their decision until all the evidence is in. I am not going to tell them that every day.

MR. FINK: I think there should be at least one instruction telling them they shouldn't deliberate in groups of two and three, and they shouldn't be deliberating before —

THE COURT: I don't consider it necessary to issue any instructions now.

MR. FINK: What about the masthead about "Lawyers Laundering Money"?

THE COURT: What about it?

MR. FINK: I thought it was very prejudicial. I would like to tell them they should only consider the evidence that comes from the witness stand and not newspapers.

THE COURT: I have already told him that. And you have, too. I am not going to do anything about it.

* * *

THE COURT: What is it exactly you want me to say?

MR. FINK: I would like you to say that they should not speak about the case to anyone and that they should not read about the case and —

THE COURT: You are telling me that I should tell the jury not to read the morning paper?

MR. FINK: No. I think if there is anything about this case, they should use self discretion and should not talk about it or read about it.

THE COURT: I am not going to issue any instructions. I don't consider it necessary.

MR. FINK: All I can say, I take exception to that, because I think —

THE COURT: All right. The exception is noted. That is all.

TRANSCRIPT OF PROCEEDINGS ON MARCH 9, 1979

Page 201:

• • •

THE COURT: I am not going to tell the jury not to read the newspaper. I told you that before. If I wanted to be sure they would read it, all I have got to do is tell them not to read it.

MR. FINK: I just said not to read about this case.

THE COURT: If they read the newspaper, they are going to see it, aren't they?

I decline to instruct the jury in that way.

TRANSCRIPT OF PROCEEDINGS ON MARCH 27, 1979

• • •

Page 20:

The fact that he lied to David Shure . . .

Page 32:

That was when he suborned perjury . . .

Page 33:

Well, it was perjury, and the defendant knew it was perjury . . .

• • •

Page 138:

But the defense witnesses can be as vague as they please, and they were vague. They didn't say anything. And when they did say something, it was a lie.

• • •

Page 157:

Epstein, in his first affidavit given to the IRS, before anyone tells him he has to tell lies, he says, "Yeah, I invested with Barrett Hess in the Hubbell Road property. I'll put that down on paper. I'll write it out myself."

Later on, he's told, "Well, gee, you know, Bob, you blew it. You really invested with my father, Alfred Hess." This is probably what he's told. So he says, "No problem, Barry. I'll change the affidavit."

• • •

Page 187:

[T]he defendant is lying and he put on other liars . . .

Page 188:

Then you had Barrett Hess' testimony. You could dismiss that with a grain of salt.

Page 190:

So, he's lying to you.

• • •

Page 187:

We found out beyond any doubt that William Perry [defense witness] was lying, because his partner told you that.

Page 188:

So we were fortunate to find someone who could prove Perry was a liar. We weren't so fortunate with Russell [defense witness]. How likely is his testimony?

Page 124:

Now why do they have to use phony evidence? Because it shows how much confidence they had in Robert Epstein's [defense witness] credibility.

Page 137:

It is not important whether Janet knew the income or not. All that is important is that the defendant contrived a phony explanation to justify why he was giving this blank piece of paper. More smoke. More clouds, to cloud the issue.

Page 160:

Then Power [defense witness], he also, the CD, we showed him his tax return, didn't report the interest. Same thing again, just like Epstein. You can draw two conclusions. There was no CD, or he is also a tax cheat.

Page 161:

Shapiro [defense witness] said a lot of other things in behalf of the defendant that even the defendant would not lie about.

Page 161:

Shapiro just said something that he thought would help the defendant; even the defendant admitted that wasn't true.

• • •

Page 174:

Very scientific. Very objective. Anything the defendant says, he'll put down. Well, its one thing for him to sell his opinion for a high fee, but he went beyond that.

Pages 174-75:

Couldn't get the defendant to fly to Buffalo, twenty minute plane ride, when the defendant was faking his phobic symptoms. Five years later, the defendant flies to the Bahamas, without having seen the psychiatrist for five years, that's a tribute to his success. Pretty good trick.

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Supreme Court, U.S.
FILED
APR 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1326

In the Supreme Court of the United States

OCTOBER TERM, 1979

BARRETT HESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court issued no written opinion. The court of appeals affirmed by unpublished order (Pet. App. A3-A5).

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1979, and a petition for rehearing was denied on January 29, 1980. The petition for a writ of certiorari was filed on February 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by the district court's failure to comply strictly with Rule 30 of the Federal Rules of Criminal Procedure.

2. Whether the district court abused its discretion with respect to its handling of allegedly prejudicial publicity.

3. Whether petitioner was denied a fair trial because of alleged prosecutorial misconduct.

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on three counts of willfully evading his federal income taxes for the years 1971, 1972, and 1973, in violation of 26 U.S.C. 7201 (Pet. App. A1). Petitioner, an attorney, was sentenced to concurrent terms of six months' imprisonment on each count (*id.* at A1-A2).

At trial, the government's evidence showed that petitioner had underreported his income for the years 1971, 1972, and 1973 by approximately $38,000, $54,000, and $226,000, respectively (26-Tr. 1989-1990).[1] Petitioner did not deny that he had substantially understated his income and taxes, but he claimed that the understatements were not willful because they were the fault of his accountant (see, *e.g.*, 1A-Tr. 8-11). The government introduced evidence, however, which demonstrated that petitioner had furnished his accountant with information that was misleading and incomplete (14-Tr. 1049-1050; 21-Tr. 1531-1539; 26-Tr. 1543-1572); that petitioner had

[1]The transcript volumes are designated as "1-Tr." through "39-Tr." and "Summation Tr." The separately bound record appendix filed with the court of appeals is designated "R."

conducted numerous financial transactions, which were unknown to his accountant, through bank accounts maintained under various names in various cities and countries (14-Tr. 1043-1062; 17-Tr. 1235 through 18-Tr. 1311; 21-Tr. 1576-1581); that petitioner had understated his income not only during the prosecution years but also for a number of previous years beginning in 1967 (R. A266-A267); that he had, during the prosecution years, filed bank financial statements which indicated that he then knew his income to be much greater than that which he was reporting (R. A267-A268); that he had demonstrated thorough knowledge and attention to detail in his financial dealings apart from his taxes (R. A273-A274); and that he had attempted, after the Internal Revenue Service investigation began, to shift responsibility to his accountant (21-Tr. 1583, 1595-1596; 22-Tr. 1636). At the conclusion of the trial, which lasted more than five weeks, the jury returned verdicts of guilty on all three counts (R. A159).

ARGUMENT

1. Petitioner first contends (Pet. 3-5) that he was denied a fair trial because the district court failed to comply strictly with Rule 30, Fed. R. Crim. P. Rule 30 provides, *inter alia*, that the trial court shall inform counsel of its rulings on requested jury instructions prior to closing arguments, and that counsel shall be given an opportunity to object to the court's charge outside the presence of the jury. In this case, neither the prosecution nor the defense requested a ruling on jury instructions prior to closing arguments, and the court made no such ruling. After the court had charged the jury, however, defense counsel requested a conference in chambers so that he could object to the charge that had been given.

The court declined to go into chambers, but it advised counsel that he could make a record of his objections by noting the numerical designation of any requested instruction which he believed not to have been covered in the court's charge (R. A149-A150). The court thereafter noted the objections as they were made, but declined to discuss their substance (R. A150-A155).

We acknowledge that the district court failed to comply with the letter of Rule 30. As the court of appeals properly concluded (Pet. App. A4), however, the court's error was harmless because petitioner was not prejudiced. If defense counsel had believed that the trial court's failure to rule on the jury instructions would hamper him in the preparation of his closing argument, he could have made a timely request for a ruling. His failure to do so constitutes powerful evidence that the trial court's failure to rule prior to closing arguments was inconsequential. Indeed, the district court's charge, as the court of appeals noted, was "fair and well balanced, especially on the key issue of willfulness" (*ibid.*), and petitioner has never alleged—much less shown—that the charge was deficient in any particular part. Moreover, in the context of this long, hotly-contested trial, in which the district court had often been abrupt with both counsel, it is "highly improbable" (*ibid.*) that the jury would have been influenced by the court's curtness in disposing of defense counsel's objections.

Petitioner's analysis (Pet. 3-5) of the Rule 30 case law does not support his contention that certiorari should be granted in this case. It is true that the courts of appeals seem to have taken differing views as to the appropriate standard of review in Rule 30 cases, with the Second Circuit normally requiring that the defendant establish

prejudice to secure reversal (*United States* v. *Lyles*, 593 F. 2d 182, 189 (2d Cir.), cert. denied, 440 U.S. 972 (1979)), while other circuits hold that reversal is appropriate unless it "affirmatively appears" in the record that the defendant was not prejudiced (*United States* v. *Schartner*, 426 F. 2d 470, 479 (3d Cir. 1970); *Lovely* v. *United States*, 169 F. 2d 386, 391 (4th Cir. 1948), cert. denied, 338 U.S. 834 (1949)). Whatever significance might normally be attributed to that difference in approach, it is irrelevant in the present case because the Second Circuit held that the record affirmatively demonstrated that "there was no prejudice" (Pet. App. A4). Accordingly, this case is not an appropriate vehicle for resolving any difference in approach that might exist among the circuits.[2]

2. Petitioner also contends that the district court failed to shield the jury from allegedly prejudicial publicity. That contention is without merit. It is well-established that decisions relating to extrajudicial publicity in a criminal trial are committed to the sound discretion of the

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[2]Petitioner also suggests that this Court should grant certiorari to establish an automatic reversal rule in cases where there has been imperfect compliance with Rule 30. This Court specifically rejected that invitation in *Hamling* v. *United States*, 418 U.S. 87, 134-135 (1974). Characterizing such a rule as "unduly mechanical," the Court suggested instead that the courts of appeals review the record to determine whether prejudice resulted (*ibid.*), which is what the Second Circuit did here. Petitioner's suggestion (Pet. 4) that the Tenth Circuit adopted an automatic reversal rule in *Hall* v. *United States*, 378 F. 2d 349 (1967), is doubtful. The court's opinion is itself inconclusive, and we have found no case in which that court has since considered the question. In any event, that standard was rejected in *Hamling*.

trial court. *Marshall* v. *United States*, 360 U.S. 310, 312 (1959); *United States* v. *Bowe*, 360 F. 2d 1, 11 (2d Cir.), cert. denied, 385 U.S. 961 (1966). In this case, the court of appeals reviewed the record and properly concluded (Pet. App. A4) that the district court did not abuse its discretion.

During the course of the trial, local newspapers published a number of articles reporting the evidence that had been introduced (Pet. App. A16-A23). While petitioner correctly asserts (Pet. 6) that the trial court did not grant every one of his requests for admonitions concerning those articles, the record clearly establishes that the trial court adequately protected petitioner's rights. At the outset, the district judge admonished the jurors that their verdict must be based solely on the evidence (R. A199); he instructed them, on two occasions thereafter, that they should not consider or discuss anything which came to them from the media or other extrajudicial sources (24-Tr. 1800; R. A288); and he specifically instructed them, as part of the charge, that they must ignore outside influences, including newspaper articles, in reaching their verdict (R. A147).

Petitioner's contention (Pet. 6) that the district court improperly limited *voir dire* with respect to potential pretrial publicity, by declining to undertake individual examinations of the veniremen, also lacks merit. Considerations of time and judicial resources frequently make it impossible to examine prospective jurors individually with respect to every allegation of potentially prejudicial publicity. See *United States* v. *Colabella*, 448 F. 2d 1299, 1304 (2d Cir. 1971), cert. denied, 405 U.S. 929 (1972). As the court of appeals concluded in this case, the district court fully protected petitioner's rights. The district court

identified the single venireman who had been exposed to the newspaper article and established, without revealing the contents of the article, that it would not affect his fairness and impartiality (Pet. App. A24-A25).[3] The court further determined that no one else had been exposed to the article (*id.* at A4).[4]

In short, petitioner has failed to show either that the district court abused its discretion in handling his protests concerning extrajudicial publicity or, indeed, that he was prejudiced in any way by the publicity.

3. Finally, petitioner contends (Pet. 7) that he was prejudiced by alleged prosecutorial misconduct. Petitioner isolates (*ibid.*; Pet. App. A29-A31) a number of government counsel's questions, comments, and arguments, and asserts that they show a pattern of conduct intended to prejudice the jury. It is well-settled, however, that a criminal conviction will be reversed only if it is clear, when the entire record is viewed as a whole, that the alleged misconduct was sufficient to deny the defendant a fair trial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940); *Berger* v. *United States*, 295 U.S. 78, 85 (1935); *United States* v. *White*, 486 F. 2d 204, 206-207 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974). Moreover, when the defense makes no timely objection to alleged misconduct, as was the case with

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[3]Although petitioner exercised his peremptory challenges, the record does not show whether he dismissed the potential juror who had been exposed to the article.

[4]Petitioner's suggestion (Pet. 6) that the district court "brandished" an article in front of the entire venire has no basis in the record. The court identified the article to which it was referring merely by specifying that the article had appeared in a particular newspaper on the previous day (Pet. App. A25).

many of the instances upon which petitioner now relies, a conviction will be reversed only if a failure to do so would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 239.

Petitioner was not denied a fair trial. As the court of appeals noted (Pet. App. A4), petitioner's trial was "long and complicated" and contained "overwhelming" evidence of guilt. In this context, it is unlikely that the jury could have been misled by either counsel's isolated remarks. *United States* v. *Sprayregen*, 577 F. 2d 173, 174-175 (2d Cir.), cert. denied, 439 U.S. 979 (1978); *Berger* v. *United States*, *supra*, 295 U.S. at 89. Moreover, many of government counsel's remarks were simply not improper. For example, petitioner asserts (Pet. 7) that government counsel improperly commented on the exercise of his right to remain silent. The record shows, however, that the questions upon which petitioner relies (15-Tr. 1074-1075) in making that assertion were legitimately asked for the purpose of showing that the government had not failed to follow any leads which petitioner might have provided concerning his tax liability. *Holland* v. *United States*, 348 U.S. 121 (1954). (See also R. A262, A274-A275; 5-Tr. 245-246.) Other alleged instances of misconduct reflect comments or questions that might well have been extraneous or poorly framed, but they do not reveal that type of prejudice necessary for reversal (see, *e.g.*, Summation Tr. 68-70, 72, 74, 77, 83, 85, 86, 107, 112, 118, 157, 188, 190).

In light of the record as a whole, the court of appeals properly concluded (Pet. App. A4) that petitioner's allegations of misconduct were insufficient to warrant reversal. That fact-bound claim requires no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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